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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

~~Misc~~. No. 371

WOLF LOW,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES SUPREME COURT

SAUL GRAYSON
6380 Wilshire Blvd.
Suite 1515
Los Angeles, Calif.
90048
653-8470

Attorney for Petitioner

JOSEPH T. VODNOY
316 West Second Street
Suite 710
Los Angeles, Calif. 90012
627-1736

Of Counsel

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Of Counsel

TOPICAL INDEX

	Page
Table of Authorities	iii
PETITION FOR CERTIORARI	1
OPINION BELOW	2
GROUNDS OF JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
A. Search and Seizure, and Arrest	3
B. District Court Proceedings	7
SUMMARY OF ARGUMENT	9
ARGUMENT	10
I THE COURT OF APPEAL FOR THE NINTH CIRCUIT MISREAD THE FACTS IN THIS ACTION	10
A. Petitioner's Bag, After Being Originally Opened by Airport Employees and a Los Angeles Police Officer, Was Subsequently Re-Opened by United States Customs Officers	10

Page

B. Irrespective of Who Opened the Bags After Falbaum's Arrival at the Airport the Examination of Petitioner's Bags Was a Federal Search 13

C. The Airport Employees Had No Authority to Allow Customs Agents to Inspect the Contents of Petitioner's Bags in Violation of Petitioner's Right of Privacy 15

II THE CUSTOMS AGENTS WERE REQUIRED TO OBTAIN A SEARCH WARRANT BEFORE THEY COULD INSPECT PETITIONER'S BAGS 16

III THE ACTIONS OF THE UNITED STATES CUSTOMS OFFICERS WAS A SEARCH WITHIN THE CONSTITUTIONAL MEANING OF A SEARCH 25

A. The Search Was Done by United States Customs Officers 25

B. In No Event Did Private Persons Supply the Customs Officers With the Evidentiary Fruits of an Illegal Search So As to Make the Evidence Admissable in a Federal Prosecution But Such Evidence Was Furnished by a Los Angeles Police Officer 26

CONCLUSION 28

TABLE OF AUTHORITIES

Cases	Page
Burdeau v. United States, 256 U. S. 465 (1921)	25
Corngold v. United States, 367 F. 2d 1 (9th Cir. 1966)	13, 21, 23, 26, 28
Elkins v. United States, 364 U. S. 206, 4 L. Ed. 2d 1669 (1960)	27
Gambino v. United States, 275 U. S. 310, 48 S. Ct. 137 (1927)	27
Gold v. United States, 378 F. 2d 588 (9th Cir. 1967)	24, 26
Hernandez v. United States, 353 F. 2d 624 (9th Cir. 1966)	18-22, 28
Johnson v. United States, 383 U. S. 10 (1948)	17
Lustig v. United States, 348 U. S. 74, 69 S. Ct. 1372, 93 L. Ed. 2d 1819 (1949)	27
People v. Fierro, 236 Cal. App. 2d 344, 46 Cal. Rptr. 132 (1965)	17

Cases	Page
Remmer v. United States, 205 F. 2d 277 (9th Cir. 1953)	25
Rios v. United States, 256 F. 2d 13, vacated 364 U. S. 253, 80 S. Ct. 1431, 4 L. Ed. 2d 1688 (1960)	27
United States v. Blum, 329 F. 2d 49 (2nd Cir. 1964)	23
United States v. Culver, 224 F. Supp. 419 (D. C. Md. 1963)	25
United States v. Frank, 225 F. Supp. 573 (D. C. D. C. 1964)	25
United States v. Masterson, 251 F. Supp. 937 (S. D. N. Y. 1966)	26
Wong Sun v. United States, 371 U. S. 471 (1963)	17

Constitution	
United States Constitution:	
Fourth Amendment	3, 9, 16, 17, 28

Statutes	
Title 18 United States Code, §545	3, 7
Title 28 United States Code, §1254(1)	2

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PETITION FOR CERTIORARI TO THE UNITED STATES SUPREME COURT

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari

issue to review the judgment of the United States Court of Appeal for the Ninth Circuit entered in the above entitled case on March 6, 1968.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported in 391 F. 2d 61 (1968).

GROUNDS OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit, affirming the judgment below, was filed and entered March 6, 1968. Jurisdiction of this court on certiorari is based on 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

WAS THE PHYSICAL EVIDENCE USED AS THE BASIS FOR ARREST AND CONVICTION OBTAINED IN VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and Statutory Provisions involved are:

United States Constitution,
Fourth Amendment

18 U. S. C., Section 545

STATEMENT OF THE CASE

The facts material to the questions presented are as follows:

A. Search and Seizure, and Arrest

At approximately 5:25 p. m., on March 28, 1965, Petitioner came to the Bonanza Airlines ticket counter at the Los Angeles International Airport, Los Angeles, California, where he purchased a one-way ticket to Las Vegas, Nevada, for a flight to leave at 5:45 p. m. that evening (M. T. 4/19-25; 5/1-10; 7/14-20; T. T. 6/18-25; 7/1-8/8) 1/

1/ The Reporter's Transcript of proceedings at the hearing on Petitioner's Motion to Supress will be indicated by the legend "M. T. "
(continued)

Petitioner had two bags with him which he wished to check to Las Vegas, the weight of which were in excess of the forty (40) pound weight allowance (M. T. 5/11-12; T. T. 5/16-20).

Due to Petitioner's failure to object to paying excess baggage charges and asking for change in quarters, the ticket agent, Mr. Hansen, became suspicious of the contents of Petitioner's bags and thought that the bags might contain explosives (M. T. 9/4-11; 9/21-11/18; T. T. 9/6-16; 12/13-19). After Petitioner left the ticket counter, Mr. Hansen attempted to open Petitioner's bags, but was unable to do so as they were locked, so he applied pressure to the bags and shook them a little and found that the bag he shook was tightly packed (M. T. 12/11-23; T. T. 9/4-10/14). Mr. Hansen then placed Petitioner's bags on the conveyor belt to the airplane and called another employee at the ramp area about the bags (M. T. 12/24-13/7; T. T. 10/12-14; 12/24-13/3).

When he called the other employee, Mr. Hansen suggested that the baggage tag be removed from one of Petitioner's bags and that

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1/ (continued) followed by appropriate page and line references. The Reporter's Transcript of Proceedings at the trial will be indicated by the legend "T. T." followed by appropriate page and line reference. The Clerk's Transcript of Record will be indicated by the legend "C. T." followed by appropriate volume, page and line reference.

Petitioner be asked to identify the bag by its contents (M. T. 13/5-25).

Pursuant to Mr. Hansen's suggestion, the baggage tag was removed and Mr. Louis Petre, the Bonanza Airlines Passenger Service Supervisor, asked Petitioner if he would try the key and see what was in the bag to identify the bag as his (M. T. 14/1-9; T. T. 14/3-15/20).

At Mr. Petre's request, Petitioner used his key to unlock the bag and identified it as his, but did not open the bag (M. T. 14/20-15/4; 44/9-25; T. T. 16/24-17/13).

Prior to the departure of Petitioner's flight to Las Vegas, his bags were removed from the airplane (M. T. 15/13-15).

Baggage keys were obtained from the TWA Lost and Found Office. These keys were then used by Mr. Petre and a Los Angeles Police Officer to open Petitioner's bags (M. T. 15/13-16/1; 46/1-4; T. T. 18/10-25; 23/11-12).

Mr. Petre stated the reason for opening Petitioner's bags was the fear that they contained explosives (M. T. 48/21-49/7; 50/11-23; T. T. 24/14-19; 24/25-25/13).

When Petitioner's bags were opened it was discovered that they contained watches, not explosives, and therefore could be transported (M. T. 19/5-12; 46/7-10; 53/19-20). Upon seeing the watches in the Petitioner's bags the policeman who assisted Mr. Petre in opening

provisions of this chapter shall apply to the sale of packages of such brand of beer. (Added Stat. 1951, c. 655, p. 1483, § 4.)

Petitioner's bags were then contacted United States Customs (M. T. 25/19-26/4; 26/21-25/ T. T. 21/13-23).

At approximately 6:00 to 6:15 p. m. that same evening, Customs Port Investigator Walter Russell called Custom Agent Falbaum at his home. Russell told Falbaum that there was a shipment of watches and watch movements destined for Las Vegas and asked Falbaum to come to the airport and examine them (M. T. 26/11-27/4; T. T. 27/14-22).

Falbaum then proceeded to the airport. When he arrived agent Russell showed him Petitioner's bags (T. T. 27/20-28/2). When Falbaum first saw the bags they were closed but unlocked (M. T. 28/21-29/20; T. T. 28/3-4; 29/13-18). Falbaum then opened Petitioner's bags (M. T. 30/17-18; 31/11-12; 41/21-42/2; T. T. 28/6-7; 40/1-3). In order to inspect the contents of Petitioner's bags it was necessary for Falbaum to break open some of the packages in the bags. Falbaum then examined the watch movements that were contained in these packages (M. T. 30/2-23; 33/11-12; T. T. 37/9-18). Falbaum's examination revealed that the watch movements contained in Petitioner's bags did not bear an importer's symbol or had an obliterated symbol (M. T. 40/18-41/11; T. T. 37/9-23).

When agent Falbaum inspected Petitioner's bags, Falbaum did not have a search warrant nor had he obtained Petitioner's consent to examine the contents of the bags (T. T. 39/19-25; 40/8-9).

Petitioner's bags were then placed aboard the next Bonanza flight to Las Vegas. Agent Falbaum and agent Guderian were also on the flight (M. T. 34/5-16; T. T. 29/18-22). This flight left Los Angeles between either 8:00 and 8:30 p. m. (T. T. 29/23-25) or sometime after 8:30 or 9:00 p. m. (M. T. 33/14-34/11) and arrived in Las Vegas at approximately 10:20 p. m. (M. T. 34/12-13).

Upon Petitioner's arrival in Las Vegas he was advised by Bonanza Air Line personnel that his bags would be on Bonanza's next flight to Las Vegas (M. T. 35/1-9).

At approximately 10:30 p. m. (M. T. 35/10-12) or between 9:25 and 9:30 p. m. (T. T. 30/25 -31/2; 33/14-25). Mr. Low arrived at the Las Vegas Airport to get his two bags. He was then arrested (M. T. 35/11-14; T. T. 31/17-33/13).

B. District Court Proceedings

Following Petitioner's arrest by agents of the United States Bureau of Customs, criminal proceedings were instituted against him in behalf of the United States of America charging him with a violation of Title 18 United States Code, Section 545, which prohibits, inter alia, the transportation of merchandise imported and brought into the United States contrary to law (C. T. Vol. 1, pg. 5).

On July 12, 1965, Petitioner made his motion to suppress the evidence and for the return of the personal property taken from him (C. T. Vol. 1, pg. 15). This motion was made upon the basis that the examination of his bags by agents of the United States Bureau of Customs was in violation of his constitutional rights against illegal search and seizure.

The hearing on this motion was held September 20, 1965, in the United States District Court for the District of Nevada and evidence was presented to the Court (M. T. 54/8-23; C. T. Vol. 1, pg. 44). On September 29, 1965, the Court denied Petitioner's motion (C. T. Vol. 1, pg. 58).

Following the Court's denial of Petitioner's motion, the case came on for trial on September 22, 1966. During the course of the trial, Petitioner objected to the admission into evidence of the two bags and their contents (watches) which were taken from him at the time of his arrest (T. T. 75/8-19; C. T. Vol. 1, pp. 81-82).

At the conclusion of the trial, the trial court found Petitioner guilty as charged (T. T. 84/16-17; C. T. Vol. 1, pg. 82).

The government's primary evidence at the trial were Petitioner's two bags containing watch movements which had been searched by United States Customs Agents at the Los Angeles Airport and seized from Petitioner at the time of his arrest.

The majority opinion of the Court of Appeals affirmed the judgment of the trial court and rejected Petitioner's contention that his bags had been illegally searched and that his conviction was the result of this illegal search and seizure. The court's reason for affirming the conviction was that there was no search by the custom's officers in the constitutional sense. The dissent would have reversed Petitioner's conviction by reason of an illegal search and seizure.

Petitioner submits that the facts as set forth in the dissenting opinion, are the true facts in this case.

SUMMARY OF ARGUMENT

In the instant action, evidence which was obtained as a result of an illegal search and seizure by agents of United States Customs was used to secure Petitioner's conviction. The use of such evidence violates Petitioner's constitutional rights under the Fourth Amendment. Also, Petitioner's conviction was apparently affirmed on appeal solely by reason of an obvious misreading of the facts by the majority.

ARGUMENT

I

THE COURT OF APPEAL FOR THE NINTH CIRCUIT MISREAD THE FACTS IN THIS ACTION

A. Petitioner's Bag, After Being Originally Opened by Airport Employees and a Los Angeles Police Officer, Was Subsequently Re-Opened by United States Customs Officers

The majority opinion of the Court of Appeals in setting forth the facts, states, in part:

> "The policeman suggested that the United States Customs Service should be informed of what had been found. This was done and a customs official, Mr. Falbaum, came to the airport. The bags had been closed but had not been locked, and they were opened for Falbaum's inspection. The record is not clear as to whether the lids of the unlocked suitcases were physically lifted by airport employees or by Falbaum himself, or by both." (391 F. 2d 61).

. . . . .

"As we analyze the case, the custom's officers made no search at all, within the constitutional meaning of a search. . . . They would not have to search for it nor obtain access to any closed container to see it. . . . When they arrived at the airport the airport employees opened the suitcases, which had been left unlocked so that they could be readily opened for the customs officers to view the contents. The airport employees had no thought of returning the suitcases to the passenger without first getting the opinion of the customs officers as to whether the airline was being used for transportation of contraband. . . ." (391 F. 2d 63) (Emphasis added).

The dissenting opinion states:

"My reading of the record convinces me that Falbaum opened the suitcases. If, as suggested by the majority opinion, some airport employee may have opened or assisted Falbaum in opening the suitcases, this was done after the arrival at the airport of Falbaum, and in his presence as a Customs Agent of the United States, and at his tacit direction. In my view, Falbaum must be charged with the opening of the lids to the suitcases.

"After the suitcases were opened, Falbaum examined the contents before he learned that they were contraband. In this respect he testified that it was only

after he had broken open several of the packages of watch movements in the suitcases, and carefully examined them, that the examination revealed the absence on the watch movements of the importers symbol on some of the watch movements, or the presence of an obliterated symbol on others." (391 F. 2d 63-64) (Emphasis added).

Petitioner submits that the record is clear that it was not the airport employees who contacted customs or even thought of contacting customs, but rather it was the Los Angeles Police Officer who originally assisted in opening the bags who contacted customs at his own suggestion 2/; it was not the airport employees who re-opened the bags after Falbaum's arrival so Falbaum could inspect their contents, but Falbaum himself 3/; and that it was Falbaum

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2/ Testimony of Louis A. Petre, M. T. 46/21-25; T. T. 21/13-23.

3/ Testimony of Bertram S. Falbaum, M. T. 28/21-30/18; 41/21-42/2; T. T. 28/3-7; 40/1-3. It is apparently the testimony of Falbaum on pages 41 and 42 of the Motion Transcript relating to who opened the bags that is the basis for the majority's holding that the record is not clear on this point. If this is so, thereby making the record ambiguous on this point, the record is still clear that the re-opening of Petitioner's bags was done at Falbaum's direction as he states he "was assisted in opening them".

alone who opened the small packages containing watches, which were in Petitioner's bags. 4/

The majority opinion makes the irrelevant distinction between a locked and unlocked suitcase, where in fact the important distinction is whether the contraband nature of the contents of the bags was obvious or whether an additional search was necessary, i. e., breaking open the packages contained in Petitioner's bags.

B. Irrespective of Who Opened the Bags After Falbaum's Arrival at the Airport the Examination of Petitioner's Bags Was a Federal Search.

A case similar to the instant case is Corngold v. United States, 367 F. 2d 1 (9th Cir. 1966). In Corngold customs agents told a Trans World Airlines transportation agent that they suspected that certain packages Corngold was shipping to New York contained contraband, and that the packages had been mislabeled. The customs agents then asked the TWA agent if he had authority to open the packages. The TWA agent stated that he had authority to open the packages, whereupon the customs agents asked him if he wanted to open the packages and told him that if

4/ Testimony of Bertram S. Falbaum, T. T. 37/5-23.

he did, they wanted to be with him. The TWA transportation agent initially opened the packages with the help of the customs agents. The customs agents then removed, opened and inspected the contents of the small boxes contained in the packages and determined that the boxes contained unsymboled watches.

The Court, in holding that the action of the customs agents constituted an illegal search and seizure, stated at 367 F. 2d 5, 6:

> "But the evidence would be excludable in the present case even if the TWA employee had not acted solely to satisfy the government's interest in viewing the contents of the package, but instead had initiated and participated in the search for reasons contemplated by the inspection clause in TWA's tariff. The customs agents joined actively in the search. They held open the flaps of the large packages; removed, opened, and inspected the contents of the small boxes which it contained; and marked the small boxes for future identification. Thus, at the very least, the search of appellant's package was a joint operation of the customs agents and the TWA employee. When a federal agent participates in such a joint endeavor, 'the effect is the same as though he had engaged in the undertaking as one exclusively his own.' (citations omitted)."

In the instant action, it was a Los Angeles Police officer who assisted the airline employees in opening Petitioner's bags; it was the United States customs agents who examined the small packages contained within Petitioner's bags, not airport employees. Additionally, if an airport employee opened Petitioner's bags after Falbaum arrived at the airport, it was done at the express direction of Agent Falbaum, or Mr. Russell, the Custom's Port Investigator.

C. The Airport Employees Had No Authority to Allow Customs Agents to Inspect the Contents of Petitioner's Bags in Violation of Petitioner's Right of Privacy.

Petitioner's two bags were delivered to the airline for transportation with him to Las Vegas. The inspection clause in the airline's tariff authorized inspection by the airline only and no others. 5/ Therefore, the airline had no authority to consent on behalf of Petitioner to an inspection of the contents of his bags by customs agents. The stated reason for the airlines inspection of Petitioner's bags was to determine if the bags contained explosives or any other substances harmful to the flight. Nothing of this nature was found in Petitioner's bags. At that

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5/ Plaintiff's Exhibit 3, T. T. 76/5-77/3; C. T. - Vol. 1, pp. 81-82.

point it was the Los Angeles Police Officer, not the airline employees, who suggested that United States Customs be contacted and who in fact was the person who contacted Customs. 6/

II

THE CUSTOMS AGENTS WERE REQUIRED TO OBTAIN A SEARCH WARRANT BEFORE THEY COULD INSPECT PETITIONER'S BAGS

Petitioner contends that the facts and circumstances of this case do not justify the customs agents' conduct in lieu of obtaining a search warrant.

The Fourth Amendment to the United States Constitution declares and provides for a standard of conduct relating to searches and seizures.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons

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6/ Further argument will be had upon this at Point III, infra.

or things to be seized."

The purpose of the Fourth Amendment and the rule excluding illegally seized evidence is the deterrence of the lawless acts of Federal and State officers. People v. Fierro, 236 Cal. App. 2d 344, 46 Cal. Rptr. 132 (1965).

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferriting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."
>
> Johnson v. United States,
> 383 U.S. 10, 13-14 (1948);
>
> Wong Sun v. United States,
> 371 U.S. 471, 497-498 (1963).

The government has the burden of proving that a search and seizure, without a warrant,

was justified. Hernandez v. United States, 353 F. 2d 624 (9th Cir. 1966).

The government had the burden of proving that it would not have been practical to secure a search warrant before its agents conducted the search. Hernandez v. United States, supra.

A search without a warrant is invalid unless made (1) incident to a lawful arrest, or (2) in exceptional circumstances, such as the imminent threat that contraband will be removed or destroyed. Hernandez v. United States, supra.

In this case the Petitioner was arrested in Las Vegas, Nevada after his luggage had been searched, in his absence, in Los Angeles, California. The search was independent of the arrest, for the customs officers knew that the Petitioner had already departed for Nevada and that his luggage had been detained by the airline personnel in Los Angeles, until such time as the customs officers had an opportunity to search and investigate the contents of the Petitioner's luggage. The sole objective of the customs agents going to the airport was to search the Petitioner's luggage, for the purpose of ascertaining whether there was any objects or items that would violate the laws of the United States. It was already known to the customs agents that the Petitioner had departed for Las Vegas.

Hernandez v. United States, supra, involved a prosecution for violation of the narcotics law where the defendant was alleged and found to have unlawfully transported and concealed 114

pounds of marijuana. The physical evidence, marijuana, was found and obtained from the defendant's suitcases, which had been given to an airline ticket to New York. The evidence was obtained as a result of a search and seizure, conducted by Los Angeles Police Officers without a warrant. Thereafter, a federal prosecution was initiated.

In the Hernandez case, the police were already aware of, and investigating the transportation of narcotics by Latin-Americans, who traveled by air, first class, upon non-stop Los Angeles to New York flights, carrying luggage which bore the brand name of "Ventura". The bags were usually heavy because of the weight of the narcotics These parties paid their fares and overweight luggage charges in cash with bills of a large denomination. The police had investigated eight (8) such cases within the last two years and had requested the airlines to be on the alert for persons who would fit this particular pattern and description.

An airline employee so informed a Los Angeles police officer of a person who fitted the pattern. The officer responded by going to the airline to investigate.

It was then ascertained from the airline employee that the defendant 1) purchased a first class ticket to New York on a non-stop flight; 2) did not have an advance reservation; 3) had two suitcases that totalled 155 pounds, which was 115 pounds over the weight limit; and 4) had paid for his fare and overweight charges

with a one hundred dollar bill.

The officer also personally observed that the luggage which was in the possession of the airline in the storage area, was of the "Ventura" brand with combination locks, that when he lifted and felt the bags and caused air to escape therefrom by pressing the sides together, he detected the odor of marijuana. He then summoned narcotics officers who likewise, after squeezing the bags together, detected the odor of marijuana. The officers then located the defendant in the airline terminal, placed him under arrest, after which the bags were opened, searched and the marijuana seized.

In the Hernandez case, the flight to New York had not departed prior to his arrest.

On the issue of search and seizure the government contended:

1. The bags were not searched until they were actually opened.

The court held that the manipulation of the bags by the officers constituted a search.

2. The search was incident to a lawful arrest.

The court held the search was independent of any arrest, since the officers did not go to the storage area to arrest the defendant and incidently search the bags because they knew that the defendant was not at that location. The

purpose of the officers going to the storage area was solely to search the bags.

3. It was impractical to have obtained a search warrant before the bags would have been removed.

The court agreed that the evidence presented as to this issue was sufficient to sustain a finding in favor of the prosecution. The court's opinion on this issue, consisted of one paragraph:

> "The burden rested on the government to prove that it would not have been practical to secure a warrant before the bags were removed. (Citation) The police were first contacted at 8:30 P. M. Appellant and his luggage were scheduled to depart at 10:50 P. M. There was uncontradicted testimony that a warrant could not have been obtained until the following morning. (Citation) Absent contrary evidence, this was a sufficient showing."

Hernandez v. United States, supra.

It is to be noted that in the instant case the court did not discuss the fact that the suitcases were in the effective possession and control of the airline (compare with Corngold case) and additionally, the record does not indicate even an attempt by customs to obtain a warrant before searching Petitioner's luggage.

4. The police officers had "probable cause" to search the defendant's suitcase without a warrant.

The court in Hernandez held that the facts known to the officers prior to his investigation of the defendant coupled with his own investigation was sufficient to support a reasonable belief that the defendant's bags probably contained contraband narcotics.

This finding was required because "the fact that it was impractical to secure a warrant did not dispense with the need for probable cause".

Although the court sustained the validity of the search in the Hernandez case on the ground that the officer had "probable cause" to believe that the bags contained contraband, a word of caution was expressed by the court, less its decision be miscontrued. Thus, the court said:

> "To sustain the finding of probable cause on this record is not to authorize officers to conduct general searches for unknown offenders on mere suspicion. A search cannot be used as an investigative technique for securing evidence of the commission of crime. (Citation) The circumstances upon which Sgt. Butler relied were within his knowledge before the search was initiated, and were sufficient to justify a reasonable man in believing that the very bags which Sgt. Butler searched did in fact contain marijuana." (p. 628)

In Corngold, supra, the court, in citing United States v. Blum, 329 F. 2d 49 (2nd Cir. 1964) stated at page 6:

> "The facts in United States v. Blum, 329 F. 2d 49 (2d Cir. 1964), are not clear from the opinion. There is a suggestion that the package involved was opened by customs agents 'with permission' of the carrier. 329 F. 2d at 50. On the other hand, the opinion indicates that the customs agents secured a search warrant after the package was initially opened and its contents disclosed (ibid.), and the ruling of the court is stated in language which suggests that the carrier itself opened the carton and examined its contents for the purpose contemplated by its reservation of a right of inspection. 329 F. 2d at 52. We would of course agree that if a carrier, while inspecting packages for its own purposes pursuant to a provision in the contract of carriage, discovers contraband and notifies the customs agents of that fact, and the agents then secure a warrant on the basis of this information and conduct a search, the search is entirely proper. This is precisely the procedure which the Fourth Amendment contemplates." (Emphasis added)

It is important to note that in deciding the instant case the Court of Appeals made no mention of Corngold, although it was cited in

Petitioner's briefs. It therefore appears that there are no guidelines available in the Ninth Circuit as to when a search warrant is required to inspect baggage of airline passengers arriving or departing Los Angeles International Airport on flights solely within the United States.

Petitioner also submits that there was no probable cause for either the customs search or the issuance of a search warrant as the merchandise contained in Petitioner's bags was not identifiable as contraband without a close examination. Compare the facts in this case with Gold v. United States, 378 F. 2d 588 (9th Cir. 1967) where an airline inspection of a package indicated obvious contraband, i. e., pornographic film; where the airline employees unaccompanied by any state or federal officer, opened the package in question; and where the airline employees and not a government representative contacted customs officials.

III

THE ACTIONS OF THE UNITED STATES CUSTOMS OFFICERS WAS A SEARCH WITHIN THE CONSTITUTIONAL MEANING OF A SEARCH

A. The Search Was Done by United States Customs Officers

The majority opinion of the Court of Appeals for the Ninth Circuit held that the action of the airline in searching Petitioner's bags and the conduct of the government in making use of the information and evidence fits readily within the doctrine of Burdeau v. McDowell, 256 U.S. 465 (1921); Remmer v. United States, 205 F. 2d 277, 285 (9th Cir. 1953); United States v. Culver, 224 F. Supp. 419, 438 (D.C. Md. 1963); United States v. Frank, 225 F. Supp. 573, 575 (D.C. D.C. 1964).

Petitioner strongly disputes this holding of the court.

Although it was the airline employees and the Los Angeles Police Officer who originally opened Petitioner's bags, the evidence is clear that it was not the airline employees who broke open the packages contained in Petitioner's bags to determine the contraband nature of their contents, but that this action was done by a United

States Customs officer, without a warrant or probable cause.

See Corngold v. United States, supra;

Gold v. United States, supra.

Accordingly, the cases cited by the Court of Appeals are not applicable as the search was not done by private individuals unconnected with the government.

B. In No Event Did Private Persons Supply the Customs Officers With the Evidentiary Fruits of an Illegal Search So As to Make the Evidence Admissable in a Federal Prosecution But Such Evidence Was Furnished by a Los Angeles Police Officer

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As was stated in Point III above, the cases cited by the majority of the Court of Appeals are not applicable.

In setting forth the basis for allowing the Federal Government to use evidence illegally obtained by private persons, the court in United States v. Masterson, 251 F. Supp. 937, 940 (S. D. N. Y. 1966) stated:

"Evidence illegally secured by a private party in which the government

did not directly or indirectly participate, is not suppressable. (Citation omitted). This result necessarily follows from the government's inability to affect the conduct of private parties unconcerned with the prosecution."

As was stated previously, the facts in this case indicated that it was the Los Angeles Police Officer who suggested that United States Customs be called in and who in fact was the one who contacted Customs concerning Petitioner's bags. Accordingly, this was not a situation where "the government did not directly or indirectly participate" in the search. The Los Angeles Police Office who contacted customs was the same police officer who took an active part in assisting in the original opening of Petitioner's locked bags. His subsequent actions were therefore done for the benefit of federal officers.

See Lustig v. United States,
348 U.S. 74, 78-79,
69 S. Ct. 1372, 93 L. Ed. 2d 1819,
1823-1824 (1949);

Gambino v. United States,
275 U.S. 310, 48 S. Ct. 137 (1927);

Elkins v. United States, 364 U.S. 206,
4 L. Ed. 2d 1669 (1960);

Rios v. United States, 256 F. 2d 13,
vacated 364 U.S. 253, 80 S. Ct. 1431,
4 L. Ed. 2d 1688 (1960).

CONCLUSION

As a result of the instant case the law in the Ninth Circuit is now completely obscured regarding two fundamental questions:

1) What is a search within the Fourth Amendment;

2) When must a search warrant be obtained.

To conclude that agent Falbaum's actions did not constitute a search seems to subvert numerous Ninth Circuit cases, such as Hernandez and Corngold. The failure of the majority to even mention these cases is even more amazing. This case can only be considered a sub silento overruling of the Corngold case. If a search warrant was not needed in this case, it is hard to imagine an airline search case in which one would be necessary.

To leave the Wolf Low decision stand would create chaos and uncertainty in the Ninth Circuit.

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari be granted.

Respectfully submitted,

SAUL GRAYSON

Attorney for Petitioner

Of Counsel:

JOSEPH T. VODNOY

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No. 571

In the Supreme Court of the United States

OCTOBER TERM, 1968

WOLF LOW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 371

WOLF LOW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals affirming petitioner's conviction for receiving, concealing and facilitating the transportation and concealment of watch movements unlawfully smuggled into the United States in violation of 18 U.S.C. 545 was entered on March 6, 1968. A petition for a rehearing was denied on April 22, 1968. On July 1, 1968, Mr. Justice Douglas granted petitioner's application, filed that day, for an extension of time until August 2, 1968, to file a petition for a writ of certiorari. The application rep-

resented that the order denying rehearing was entered on June 3, 1968, while in fact it was the mandate of the court of appeals which was issued on that date. The petition is therefore out of time under Rule 22(2) of this Court.

In any event, the petition is without merit. Petitioner purchased a one-way airline ticket from Los Angeles, California, to Las Vegas, Nevada, and presented two suitcases as baggage (II R. 51). The airline personnel, suspecting that the suitcases might contain explosives (II R. 8-10, 25, 45, 48),[1] held them off the plane and unlocked and opened them (II R. 18, 45). A police officer assigned to the airport was requested to witness the opening of the suitcases (II R. 49-50), and to assist in finding from the airline's supply a key that would open them (II R. 45). The tariff rules, set by the C.A.B., authorize airlines to open and inspect any baggage tendered for transportation (II R. 16, 47-48), and airline personnel are instructed to open and inspect passengers' baggage if they are doubtful about its contents (II R. 22).

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[1] Suspicion was aroused because petitioner, unlike most passengers, did not argue about the overweight charge placed on his baggage and yet carried the baggage to the ticket counter instead of engaging a porter to do so; because the suitcases were packed more tightly than is usual; because petitioner bought a one-way ticket and requested the ticket agent to supply him with a large number of quarters, raising the possibility that he intended to purchase an inordinate amount of insurance; and because when petitioner was requested to open the suitcases in order to identify them (the baggage tags having been removed to make the request appear reasonable), he merely turned his key in the locks but did not open them (II R. 9-11, 14-15, 22-24, 44).

When the suitcases were opened, they were found to be filled with watches, wrapped in foam rubber. At the suggestion of the police officer, a customs official was summoned (II R. 19, 46). His examination of the watches disclosed that the movements lacked the importer's symbol which is placed, pursuant to treaty, upon all lawfully imported watch movements by the Swiss manufacturers (II R. 40-41).[2] Petitioner was then advised, in accordance with the established routine when baggage is inadvertently left off a passenger's flight, that his suitcases would be on the next flight and that he could pick them up when that flight arrived in Las Vegas (II R. 35, 39). When petitioner claimed his suitcases and placed them in his automobile, he was arrested and the suitcases and watches were seized.

The initial inspection of the baggage by the airline personnel was a reasonable and proper exercise of their responsibility to protect the safety of their planes and passengers. Compare *United States* v. *Blum*, 329 F. 2d 49, 52 (C.A. 2), certiorari denied, 377 U.S. 993. The result of their inspection, which was properly called to the attention of the custom officials, created probable cause to believe that the baggage contained unlawfully imported, and hence con-

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[2] The customs official did not attempt to obtain a search warrant before going to the airport to examine the baggage because it was Sunday and the commissioner's office was closed (II R. 36-37, 40). Time was of the essence, since if the suitcases were not placed on the next flight to Las Vegas, petitioner might have become suspicious and not appeared to claim them, and there was no information as to where he could be located if he did not appear (II R. 32-33).

traband, watches. Petitioner's right of privacy in his baggage was already fully breached when the airlines officials made their lawful inspection of it. Moreover, "exceptional circumstances" existed justifying search of the baggage by customs officials without a warrant. See *Hernandez* v. *United States*, 353 F. 2d 624, 627 (C.A. 9), certiorari denied, 384 U.S. 1008. The arrest of petitioner and seizure of the baggage incident thereto was therefore justified. This case is different from *Corngold* v. *United States*, 367 F. 2d 1 (C.A. 9), where the initial inspection was at the specific request of government agents and was conducted for the sole purpose of discovering contraband. Any possible conflict between the two cases is, contrary to petitioner's assertion (Pet. 28), a matter for the Ninth Circuit to resolve.

For the foregoing reasons, it is respectfuly submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys.

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